

CLACKAMAS COUNTY BOARD OF COUNTY COMMISSIONERS

Policy Session Worksheet

Date: October 20, 2015 **Approx. Start Time:** 2:30 p.m. **Approx. Length:** ½ hour

Presentation Title: Clackamas River Water Flows

Department: County Administration

Presenters: Ernest Hayes, Commissioner Policy Coordinator

Other Invitees: Nancy Bush, Director, Clackamas County Emergency Management; Kim Swan, Water Resource Manager, Clackamas River Water Providers; Dr. Wade Hawthorne, Manager, Sunrise Water Authority; Lee Moore, Manager, Clackamas River Water

EXECUTIVE SUMMARY:

The purpose of the Policy Session is to note the status of the lower Clackamas River in relation to drought, and to explore some of the ways in which water shortage is handled in Clackamas County. This report also serves to highlight the importance of water stewardship to protect our vital resources.

The Clackamas River supports nearly all of the urban, and a large portion of the incorporated and unincorporated communities of Clackamas County. These water districts and municipalities formed an organization called the Clackamas River Water Providers, bringing all of the water providers on the lower Clackamas together for the purpose of resource protection. Through this coalition, they are able to build infrastructural and analytic capacity the individual providers could not meet on their own, and aid the overall watershed system by working collaboratively.

A table of water providers, cities, and populations served is below¹:

Provider	Cities Served	Population
City of Estacada	Estacada	2,855
City of Tigard	Tigard, Durham, King City	58,000
City of Lake Oswego	Lake Oswego	36,000
Clackamas River Water	Unincorporated North Clackamas, Sunnyside, Milwaukie and Clackamas	50,000
City of Gladstone	Gladstone	12,000
Oak Lodge Water District	Oak Grove, Jennings Lodge	33,000
Sunrise Water Authority	Happy Valley, Damascus	45,000
South Fork Water Board	Oregon City, West Linn	63,000
		299,855

¹ Clackamas River Water Providers estimates.

In December of 2013, the Oregon Court of Appeals heard arguments in *WaterWatch of Oregon, Inc., v. Water Resources Dept.* Respondents in the case include, the City of Lake Oswego, City of Tigard, North Clackamas County Water Commission, Sunrise Water Authority and South Fork Water Board (herein: municipalities). Together, these named respondents make up a large portion of the Clackamas River Water Providers alliance.

The Court was addressing concerns raised by Water Watch indicating that the water rights permits granted to the municipalities on the lower 3.1 miles of the Clackamas River would not “maintain the persistence of fish species listed as sensitive, threatened or endangered under state or federal law.” ORS 537.230(2)(c). And that, the Water Resources Department (WRD) and Oregon Department of Fish and Wildlife’s (ODFW) findings were inadequate to ensure persistence of sensitive fish species as presented. The Court found with the Petitioner, and remanded the matter back to WRD for further analysis and clarification regarding how they would meet the persistence flows necessary to ensure protection of the fish, and how the flow levels were determined.

Attachment A: February 5th Memo from Assistant County Counsel Scott Ciecko includes a more thorough analysis of the case.

A Table of Water Permits held by the municipalities is below²:

Jurisdiction	Permit	Date	Amount	Undeveloped
Lake Oswego	S-32410	10-19-67	50.0 cfs	25.0 cfs
Lake Oswego	S-37839	06-27-75	9.0 cfs	9.0 cfs
North Clackamas	S-46120	01-18-28	8.0 cfs	2.99 cfs
North Clackamas	S-35297	08-25-71	62.0 cfs	29.01 cfs
North Clackamas	S-43170	07-25-78	1.73 cfs	1.73 cfs
South Fork	S-3778	05-11-18	20.0 cfs	15.0 cfs
South Fork	S-9982	01-19-31	30.0 cfs	27.0 cfs
South Fork	S-22581	01-22-54	60.0 cfs	37.6 cfs

In speaking with Wade Hathorn of Sunrise Water Authority, he notes that “Although the actual rights available to the various providers is more complicated than presented here, there is at least sufficient water "on paper" to meet future demand. That picture, however, is not complete until you add the "instream rights" set aside for fish and other environmental concerns. That "right" can take priority over a significant portion of municipal supply. And this issue really only comes into play in early September where the instream demand increases to meet the needs of fish. That number is at the center of on-going legal hearings between the state, municipal providers and environmental groups. And though those discussion are still underway, what is apparent is that the

² *WaterWatch of Oregon Inc. v. Water Resources Dept.*, 268 Or App 187 (Dec. 31, 2014)

amount of water available to meet all these interests after the first of September is becoming more restricted. And relief only comes once it begins to rain. Throughout the summer when it's not raining, the flows in the Clackamas River are supported by snowmelt and groundwater inflows. And both of these are being impacted by climate change - as too is the water availability after September."

Kim Swan, Water Resource Manager of Clackamas River Water Providers indicated that while snow pack has been less than normal in the last year, because precipitation rates have remained stable, there is no immediate danger to the water system for those municipalities that draw from the lower Clackamas River. She did note, as did John Collins, General Manager of South Fork Water Board, Lee Moore, Manager of Clackamas River Water, and Dr. Wade Hathhorn, General Manager of Sunrise Water Authority that should dry winters and hot summers continue, there could *potentially* be an issue in the future. Water conservation will be a major component in ensuring an adequate supply as dryness continues to increase, especially during the latter part of the summer.

Mr. Moore pressed the importance of water stewardship in the Clackamas watershed. He points out that flows on the Clackamas are below normal for this time of year and "the likelihood of water providers to implement curtailment practices come September is strong." Nancy Bush, Director of Emergency Management at Clackamas County mirrored those thoughts in a July 28th report to the Board, wherein she indicated that the County Water Masters hinted that some drought response will be likely in late summer (*This report is being presented after summertime. While no drought was declared this year, a dry winter will likely precipitate drought concerns early next spring into summer of 2016*).

Mr. Moore also made an important point that to "ignore the current river conditions and push off streamflow and temperature concerns would be irresponsible." This sentiment is shared by all parties, and it is the intent of this report to impress that conservation, close watchfulness of the river, and attention to the changing climate and its effects on the water system will continue to be crucial as dryer winters and hotter summers continue. The water providers note that things as simple as cutting back irrigation of lawns and yards during dry periods has a substantial impact on water use and can aid in mitigating possible shortfalls.

Should it arise that the State requires mitigation efforts due to low flows or water shortage, there are steps in place that dictate what form those restrictions would take. According to District 20 Watermaster, Amy Kim, under Oregon law, all water is publicly owned, and a permit or license from the Water Resources Department is needed to acquire the right to draw water from a source.

There are four basic provisions governing water use in Oregon:

1. Water must be used for a beneficial purpose without waste.

2. The “principle of prior appropriations,” which states that the first person to obtain a water right on a stream is the last to be shut off in times of low streamflow.
3. “Appurtenancy” basically states that a water right is attached to the land described in the right. If the land is sold, the right stays with the land.
4. Rights must be used – Once a water right is acquired, the right must be used as described in the permit, or it may be forfeited.

Governor Brown has declared drought in all but 13 Oregon Counties, most of which lay in the Willamette Valley. When a drought is declared by the Governor, the Water Resources Department can give preference to stock watering and household consumption regardless of priority dates. Preference is always given human consumption and livestock watering over other uses. When curtailment occurs, rights to water access are managed on a seniority bases.

The use of water under a water right is restricted to the terms and conditions described in the water right certificate, including place of use, point of diversion and type of use.

The Watermaster is responsible for determining times of shortage, who has the right to use water, and provide general information to the public.³

CONCLUSION:

After receiving feedback from several of the managers of local water districts, including Clackamas River Water Providers, there does not seem to be a present risk of water restriction or moratorium on the Clackamas River. However, environmental impacts do place the region at a growing risk of drought conditions, and close monitoring and vigilant stewardship and conservation of our water resources are necessary to ensure the continued health of the watershed, and the stability of our regional resource infrastructure. The question to monitor going forward will be how do deal with late summer, demand increases and weather changes.

FINANCIAL IMPLICATIONS: (current year and ongoing): N/A

LEGAL/POLICY REQUIREMENTS: None. This is informational.

PUBLIC/GOVERNMENTAL PARTICIPATION: Partner managers of the Clackamas River Water Providers reviewed and accepted the content of this report. Lee Moore of Clackamas River Water and Wade Hathhorn of Sunrise Water Authority provided comments, and as such, this document was amended to include their perspectives.

³ Information found in “Water Rights in Oregon,” Oregon Water Resources Department, 2013

Kim Swan, Manager of Clackamas River Water Providers was very helpful in collecting information and ensuring accurate reporting on water issues as described.

OPTIONS:

This is an informational session and no options are provided to the Board.

RECOMMENDATION: N/A

ATTACHMENTS:

A: Ciecko Memo on *WaterWatch v. Water Resource Dept.*

B: Map: Clackamas River Watershed

C: Map: Clackamas River Water Providers

D: Map: Clackamas River Water Providers, Points of Diversion & Permits

E: Chart: Water Rights on the Clackamas River

SUBMITTED BY:

Division Director/Head Approval _____

Department Director/Head Approval _____

County Administrator Approval _____

For information on this issue or copies of attachments, please contact: Ernest Hayes at ehayes@clackamas.us, 503-742-5974

II. Issue Presented

Are the conditions imposed by the Department supported by substantial evidence and substantial reason to demonstrate that river flows will be maintained at a level that is sufficient for persistence of sensitive, threatened, and endangered fish species, despite the municipalities' additional use of their previously undeveloped and unused water rights?

III. Holding

No. The Department's conditions are not supported by substantial evidence and reason because they fail to actually ensure that minimum persistence flows will ever be met during summer months or that they will be met during critical fall spawning months. "The [D]epartment failed to connect the dots between its finding of *what* is necessary to maintain fish persistence – long-term meeting of persistence flows – with *how* the conditions ensures that the diversion of the undeveloped portions of the municipal parties' permits do not contribute to the long-term failure to meet persistence flows." *WaterWatch of Oregon Inc. v. Water Resources Dept.*, 268 Or App 187, 223 (December 31, 2014).

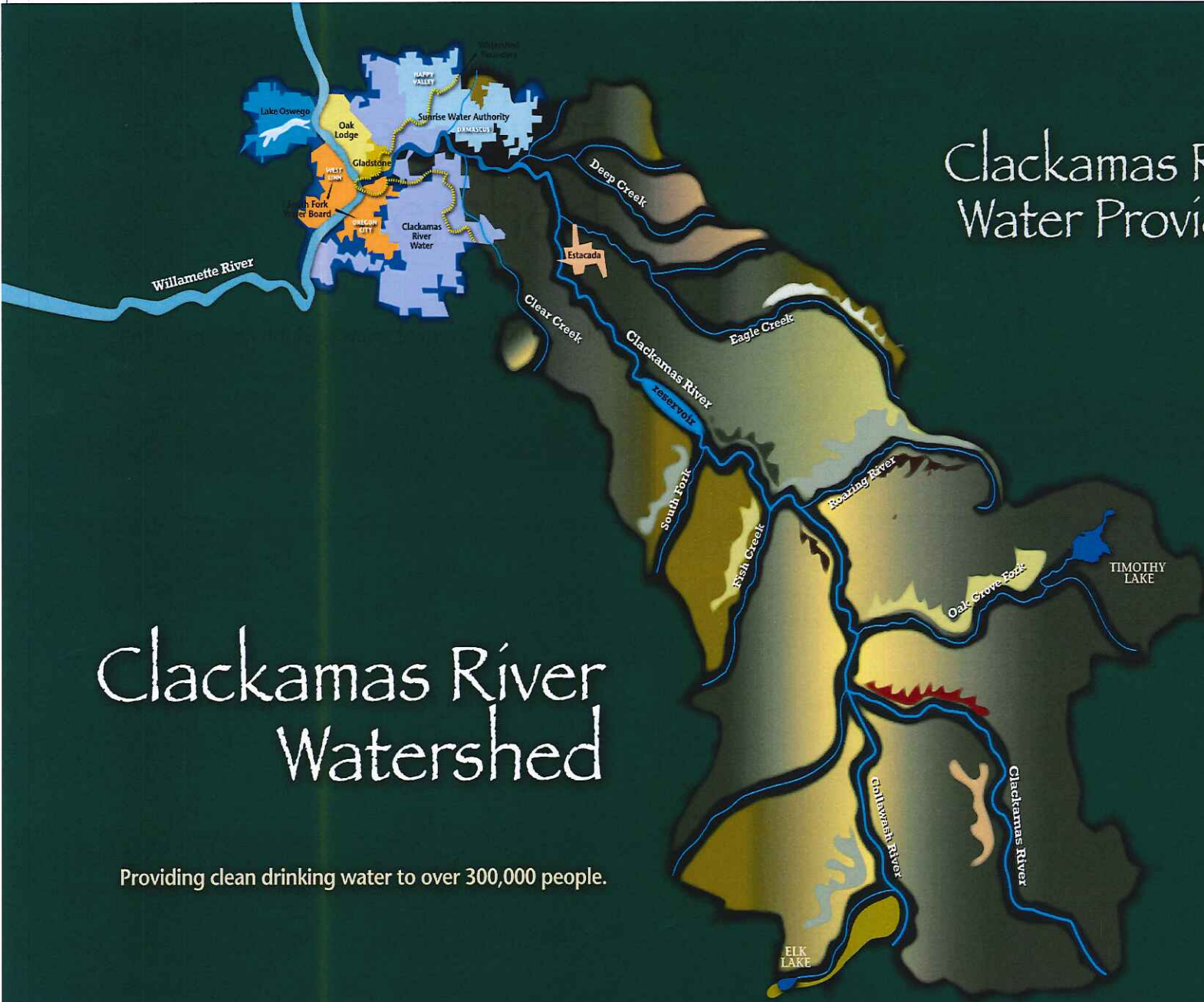
The case has been remanded to the Department for consideration of further scientific evidence and/or the imposition of conditions on the development of the previously unused portions of the water rights that will adequately ensure minimum persistence flows for sensitive, threatened, and endangered fish species.

IV. Impacts

Municipalities with undeveloped water rights that will be seeking time extensions within which to develop those rights can anticipate that any development of the rights will require evidence indicating what is needed to maintain minimum persistence flows and that development of the rights will not adversely impact those flows. If the municipality or the Department is unable to establish sufficient scientific evidence on these points, it appears that time-extensions to develop the undeveloped water rights will not be granted.

This case appears to apply only to the portions of the prior water rights that are expiring and have not yet been used by a municipality holding a permit. This decision does not create a moratorium on continued development of water rights, but does appear to highlight the scientific standard that will be applied for future applications for time extensions to develop the rights that have not yet been used.

Clackamas River Water Providers



Clackamas River Watershed

Providing clean drinking water to over 300,000 people.

Clackamas River Water Providers

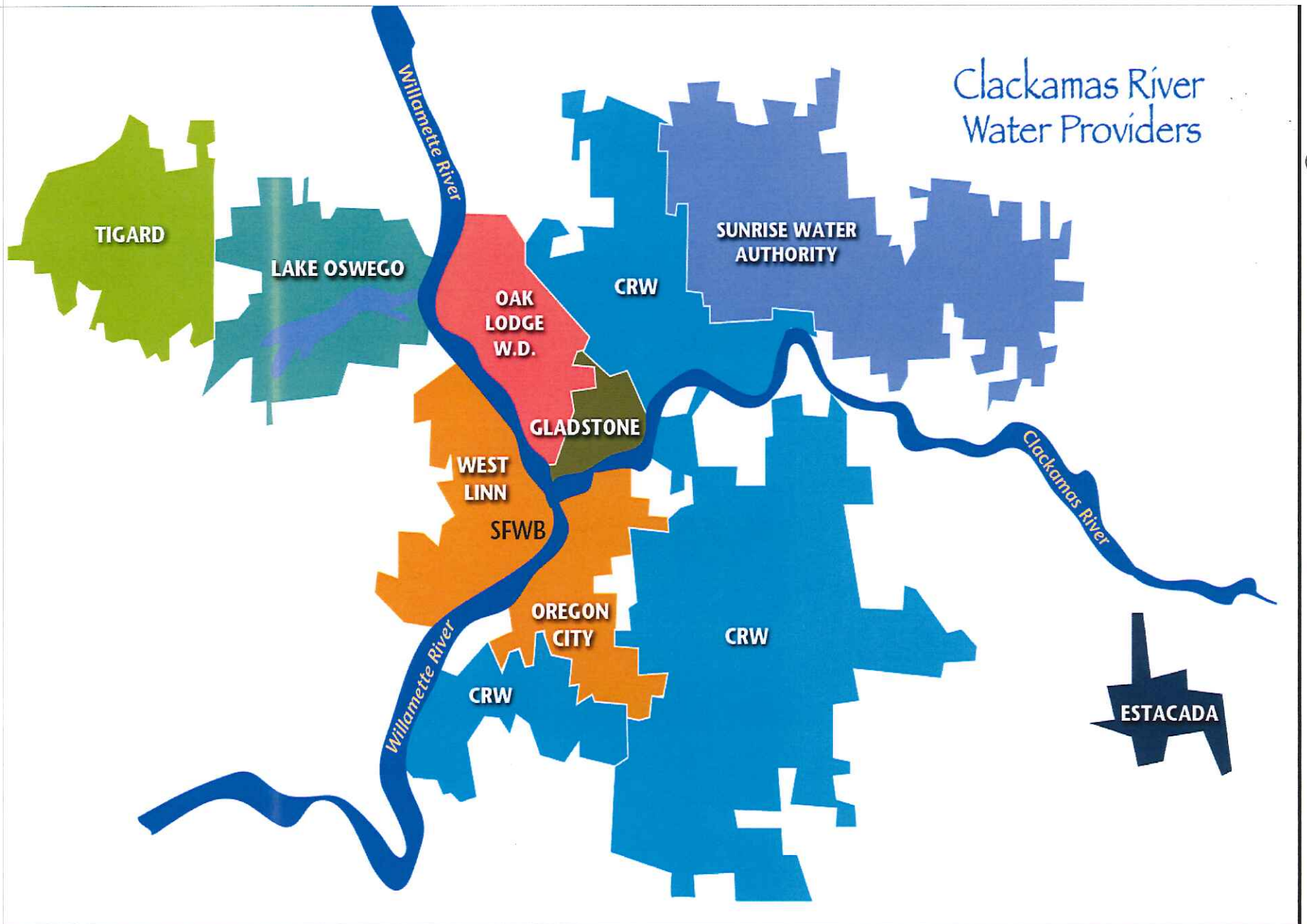
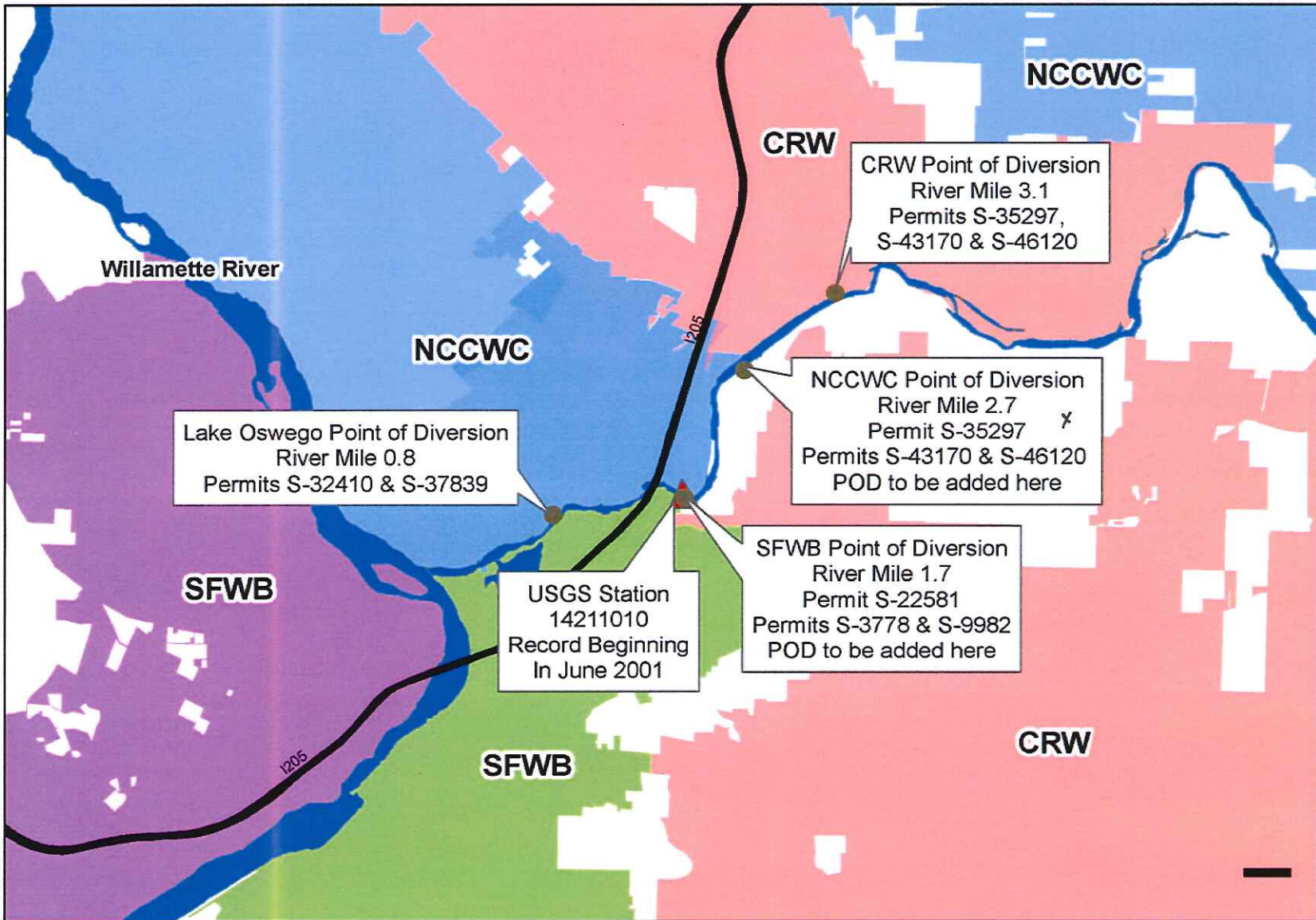
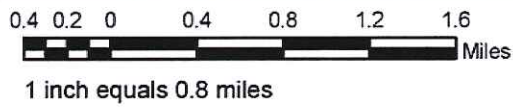


EXHIBIT C

Points of Diversion and Permits



D
EXHIBIT



Water Rights on the Clackamas

*Estimated
AVERAGE Flow of
the Clackamas
River in
September is
800 CFS*

	Certificated	
NCCWC – 10 CFS – 5/18/1994	0 CFS	
Glad – 9.73 CFS – 1978 & 1981	0 CFS	
LO – 9 CFS – 7/5/1975	0 CFS	
Estacada – 2 CFS – 1/19/1973	2 CFS	
Oak Lodge – 62 CFS – 7/1/1970	0 CFS	
CRW – 6.5 – 5/23/1969	6.5 CFS	
CRW – 25 CFS – 5/20/1968	25 CFS	
OWRD – 640 CFS – 8/26/1968 This permit is an extension of OWRD's 1966 permit and is valid September - June	N/A	
<hr/>		
MINIMUM Allowable Flow of the Clackamas River in September 640 CFS	LO – 50 CFS – 3/14/1967	25 CFS
	OWRD – 400 CFS – 5/25/1966	N/A
	CRW – 15 CFS – 4/25/1962	15 CFS
	Estacada – 2 CFS – 5/10/1955	2 CFS
	SFWB – 60 CFS – 8/31/1953	22 CFS (as of 2004)
	Glad – 4 CFS – 3/15/1951	4 CFS
	<hr/>	
	OC & WL – 30 CFS – 1926 & 1931	These water rights are specifically for the upper Clackamas River, OC, WL and SFWB do not currently have an intake to utilize these water rights.
OC – 20 CFS – 1/16/1918		
SFWB - 6 CFS - 7/17/1914		

*All Data
is the
result of
CRW and
SWA
Staff effort
and
May Not
Agree
with the
Opinions
of
OWRD*